

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PINOLEVILLE POMO NATION, et al.,

No. C 07-02648 SI

Plaintiffs,

**ORDER DENYING MOTION TO  
DISMISS FOR LACK OF SUBJECT  
MATTER JURISDICTION**

v.

UKIAH AUTO DISMANTLERS, et al.,

Defendants.

Defendants Ukiah Auto Dismantlers, Wayne Hunt, and U.S. Alchemy Corporation have filed a motion to dismiss for lack of subject matter jurisdiction. The motion is scheduled for hearing on December 18, 2007. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is appropriate for resolution without oral argument, and VACATES the hearing. Having considered the arguments of the parties and the papers submitted, the Court hereby DENIES defendants' motion to dismiss.

**BACKGROUND<sup>1</sup>**

Plaintiffs in this case are Pinoleville Pomo Nation, Pinoleville Pomo Nation Environmental Association, and Leona Williams, a member of Pinoleville Pomo Nation. The organizational plaintiffs have members who reside and own property near the site of defendants' businesses, at least one of which is an auto-dismantling operation. Plaintiffs' members also use the waters in the area for drinking, swimming, and other recreational uses. Plaintiffs allege that defendants have been discharging

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<sup>1</sup> The following background facts are taken from the allegations of plaintiffs' complaint, which for purposes of this motion, must be taken as true.

1 pollutants into the water of the United States in violation of the Clean Water Act (“CWA”) and the  
2 Resource Conservation and Recovery Act (“RCRA”). Because defendants’ facilities are generally  
3 unpaved, auto parts and other objects associated with dismantling operations sit directly on the dirt and  
4 discharge pollutants into the ground when it rains and at other times. As a result, pollutants such as oil,  
5 gasoline, anti-freeze, brake fluid, and other toxic substances associated with the dismantling business  
6 are discharged from defendants’ facilities directly and indirectly into the waters of the United States.

7 On March 29, 2006, the California Regional Water Quality Control Board issued an “Order to  
8 Cleanup and Abate Discharges” to defendants Ukiah Auto Dismantlers and other individual defendants  
9 who operate businesses on defendants’ property. The order stated that “a majority of the Facility’s  
10 activities are conducted on bare soil with no storm water treatment or Best Management Practices to  
11 contain and treat oil and petroleum products.” Complaint ex. D at 1. The order concluded that  
12 “[d]ischarge of waste has caused, or threatened to cause, pollution of soil and groundwater,” and ordered  
13 an immediate cleanup of material discharging pollutants, among other measures. *Id.*

14 On September 8, 2006, plaintiffs sent a “Notice of Violations and Intent to File Suit Under the  
15 Clean Water Act” to defendants, as well as a similar notice related to the RCRA. *See* Complaint exs.  
16 A and B. Both notices explicitly incorporated and attached the California Regional Water Quality  
17 Control Board order. The CWA notice stated that plaintiffs intended to file suit 60 days after the date  
18 of notice for continuing violations of the CWA based on defendants’ discharge of pollutants into the  
19 waters of the United States. The notice described the location of defendants’ property and operations,  
20 the pollutants that were discharged as a result of the operations, and the reasons why the discharges  
21 occurred. It also alleged that defendants failed to develop or implement a Storm Water Pollution and  
22 Prevention Plan (“SWPPP”) and a Monitoring and Reporting Program, failed to use the best practices  
23 and technology to prevent the discharge of pollutants, and failed to obtain a National Pollutant  
24 Discharge Elimination System (“NPDES”) permit for the discharge of pollutants from a point source  
25 to waters of the United States. The RCRA notice alleged that defendants have caused or threatened to  
26 cause hazardous waste to be discharged where it will likely enter the waters of the United States.

27 Plaintiffs filed this complaint on May 18, 2007. The complaint states various claims for relief  
28 for violations of the CWA, the RCRA, and the California Unfair Trade Practices statute. It also states

1 causes of action arising under the common law for negligence per se, intentional violation of statutory  
2 duty, and negligence, all based on defendants' violations of the aforementioned statutes. In addition,  
3 the complaint states freestanding common law causes of action for public and private nuisance,  
4 intentional nuisance, trespass, intentional infliction of emotional distress, and negligent infliction of  
5 emotional distress. Currently before the Court is defendants' motion to dismiss the complaint for lack  
6 of subject matter jurisdiction.

### LEGAL STANDARD

9 "It is a fundamental principle that federal courts are courts of limited jurisdiction. The limits  
10 upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither  
11 disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). "A federal  
12 court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears."  
13 *Gen. Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 969 (9th Cir. 1981). Accordingly, the burden  
14 rests on the party asserting federal subject matter jurisdiction to prove its existence. *California ex rel.*  
15 *Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir. 1979).

16 Under Federal Rule of Civil Procedure 12(b)(1), a district court must dismiss a complaint if the  
17 court lacks jurisdiction over the subject matter. Similarly, under Rule 12(b)(6), a district court must  
18 dismiss a complaint if it fails to state a claim upon which relief can be granted. The question presented  
19 by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is  
20 entitled to offer evidence in support of the claim. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).  
21 In answering this question, the Court must assume the plaintiff's allegations are true and must draw all  
22 reasonable inferences in the plaintiff's favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th  
23 Cir. 1987). Even if the face of the pleadings suggests the chance of recovery is remote, the Court must  
24 allow the plaintiff to develop the case at this stage of the proceedings. *See United States v. City of*  
25 *Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

### DISCUSSION

28 Defendants argue that plaintiffs' complaint must be dismissed for lack of subject matter

1 jurisdiction because plaintiffs failed to follow the notice procedures of the CWA and the RCRA by filing  
2 notices that were too general and lacked specificity as to the dates of violation, the identity of pollutants,  
3 and the location of the pollutants. Plaintiffs argue in response that the notices they filed were not  
4 overly-general but instead were specific enough to permit defendants to identify and rectify the  
5 violations prior to the filing of plaintiffs' lawsuit.

6 The CWA and RCRA allow citizen suits against alleged violators of the acts, as long as the  
7 plaintiff has provided specific notice to the suspected polluter, the Environmental Protection Agency  
8 ("EPA"), and state regulatory agencies at least 60 days before filing suit in federal court. 33 U.S.C. §  
9 1365(b); 42 U.S.C. § 6972(b). Under the EPA's regulations, notice under the CWA must include  
10 sufficient information to "permit the recipient to identify the specific standard, limitation, or order  
11 alleged to have been violated, the activity alleged to constitute a violation, the persons or person  
12 responsible for the alleged violation, the location of the alleged violation, the date or dates of such  
13 violation, and the full name, address, and telephone number of the person giving notice." 40 C.F.R. §  
14 135.3(a). Notice under the RCRA must include "sufficient information to permit the recipient to  
15 identify the specific permit, standard, regulation, condition, requirement, or order which has allegedly  
16 been violated, the activity alleged to constitute a violation, the person or persons responsible for the  
17 alleged violation, the date or dates of the violation, and the full name, address, and telephone number  
18 of the person giving notice." 40 C.F.R. § 254.3(a).

19 The purposes of the 60-day notice requirement are to provide an alleged violator with the  
20 opportunity to negotiate a resolution to the dispute and to give state and federal agencies an opportunity  
21 to enforce their laws and regulations. *See Wash. Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1354 (9th  
22 Cir. 1995). This 60-day notice requirement is "a mandatory, not optional condition precedent for suit,"  
23 *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989), and is jurisdictional in nature, *see Sw. Center*  
24 *for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998). In  
25 *Washington Trout*, the Ninth Circuit held that the Clean Water Act's notice provisions must be strictly  
26 construed and therefore rejected the plaintiffs' argument that the omission of two plaintiffs from the  
27 notice was a "technical deficienc[y]," reasoning that this omission had undermined the purpose of such  
28 notice by rendering resolution of the dispute prior to filing an action in federal court impossible. *Id.* at

1 1354-55.

2 Defendants argue that the Ninth Circuit's strict construction rule renders plaintiffs' CWA notice  
3 insufficient to confer jurisdiction because its discussion of the SWPPP is too general. The Court  
4 disagrees. First, plaintiffs' notice explicitly incorporated the Regional Water Quality Control Board  
5 cleanup and abatement order, which contained a great deal of specific information about discharges from  
6 defendants' facilities. Complaint ex. A at 2 ("CWA Notice"). Second, plaintiffs' notice itself, read as  
7 a whole, contained sufficiently detailed information to put defendants on notice of how they could  
8 correct the problem. The notice alleged that defendants had been polluting on a continual basis by  
9 permitting auto parts and other items related to the dismantling business to sit directly in the dirt, where  
10 storm water washed over them and carried pollutants, such as oil, grease, brake fluid, and transmission  
11 fluid, directly into the water of the United States, *id.* at 3; that this pollution occurred in part because  
12 very little of defendants' facilities were paved, such that any water ran directly into the soil and into the  
13 water supply without any controls or treatment system, *id.*; and that defendants polluted by failing to  
14 eliminate non-storm water discharges that occurred, among other times, when water was used in the  
15 washing or rinsing of vehicles, *id.* at 5. The notice can be fairly read to state that as a result of these  
16 violations, defendants had not fully developed or adequately implemented a SWPPP. Contrary to  
17 defendants' suggestion, there is no problem per se with plaintiffs' allegation that defendants failed to  
18 implement a discharge plan. *See NRDC v. Sw. Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000)  
19 ("Plaintiffs' notice letter sufficiently alleged that Defendant had failed to prepare *and implement* such  
20 a plan.") (emphasis in original). Moreover, rather than being "naked conclusions," as defendants argue,  
21 plaintiffs' notice provided sufficient information to permit defendants to identify how they violated the  
22 General Industrial Permit, i.e. by failing to develop and implement a SWPPP that would account for and  
23 correct the various instances of pollution alleged in the notice. *See S.F. BayKeeper, Inc. v. Tosco Corp.*,  
24 309 F.3d 1153, 1155 (9th Cir. 2002) ("[A]s long as a notice letter is reasonably specific as to the nature  
25 and time of the alleged violations, the plaintiff has fulfilled the notice requirement. The letter does not  
26 need to describe every detail of every violation; it need only provide enough information that the  
27 defendant can identify and correct the problem.").

28 Next, defendants contend that the notice of violation failed to identify the location of the alleged

1 violation of the CWA and the “point source” of the violation. As plaintiffs point out, most of plaintiffs’  
2 claims concern the entire operation of defendants’ properties, such as defendants’ failure to implement  
3 an adequate SWPPP or failure to acquire a permit for discharges. These general allegations addressing  
4 defendant’s failure to follow the proper procedures apply to the way defendants run their facilities, and  
5 thus plaintiffs’ identification of defendants’ facilities was sufficient to permit defendants to identify the  
6 location of the alleged violation. 40 C.F.R. § 135.3(a). The Court also agrees with plaintiffs that they  
7 provided sufficient notice to permit defendants to identify the specific point sources from which  
8 pollutants may have been discharged. The notice describes the equipment used by defendants, as well  
9 as the defendants’ facilities themselves, as point sources. CWA Notice at 6. Given the complete context  
10 of plaintiffs’ notice and the allegations that many different objects located throughout defendants’  
11 property were discharging pollutants into United States waters due to the lack of a system for preventing  
12 pollutant discharge into the groundwater, defendants were on notice how to correct the problem and  
13 could have identified the point sources. *Tosco*, 309 F.3d at 1158 (“The key language in the notice  
14 regulation is the phrase ‘sufficient information to permit the recipient to identify’ the alleged violations  
15 and bring itself into compliance. . . . Notice is sufficient if it is specific enough to give the accused  
16 company the opportunity to correct the problem.”) (internal quotation marks omitted). This is all the  
17 regulations require.

18 Defendants also argue that the notice of violation failed to state the dates of the alleged  
19 violations. Plaintiffs’ notice alleged that defendants were in continuous violation from September 8,  
20 2001, through September 8, 2006. CWA Notice at 4,5,6,7. Plaintiffs argue this provided sufficient  
21 notice because they alleged an ongoing violation occurring throughout the time defendants did not  
22 possess the proper NPDES permit and were not adequately implementing their discharge plans. The  
23 Court agrees with plaintiffs that their complaint alleges ongoing violations, such that the notice was not  
24 required to allege specific dates and the five-year period was appropriate. *See Tosco*, 309 F.3d at 1158  
25 (where ongoing violation is alleged, notice need not provide specific dates); *Sw. Marine*, 236 F.3d at  
26 996 (same). To the extent plaintiffs’ complaint also rests on specific instances of pollution, the Court  
27 also holds that it was sufficient to allege in the notice that defendants discharged pollutants into United  
28 States water sources anytime it rained and anytime defendants undertook washing or rinsing activities

1 on their property. The frequency with which such events occurred would amount to a continuing  
2 violation, and provided sufficient information for defendants to identify the dates of specific violations.  
3 *See Tosco*, 309 F.3d at 1159 (notice was sufficient where the plaintiffs alleged a violation each day the  
4 wind was sufficiently strong because defendant had notice of what it was doing wrong and how it could  
5 correct the problem); *see also Friends of Frederick Seig Grove #94 v. Sonoma County Water Agency*,  
6 124 F. Supp. 2d 1161, 1169 (N.D. Cal. 2000) (“[A] plaintiff is not required to provide in the notice letter  
7 itself an exhaustive list of each and every violation and the corresponding dates. Instead, a plaintiff  
8 must do what the CWA regulation requires: provide enough information for a defendant to identify the  
9 dates of claimed violations.”).

10 Defendants argue that plaintiffs failed to provide notice of the identity of pollutants. Notably,  
11 the regulations do not state that plaintiffs must provide notice of the identity of the pollutants, only that  
12 plaintiffs must provide sufficient information to permit defendants to identify the activity alleged to  
13 constitute a violation. 40 C.F.R. § 135.3(a). Defendants instead cite a Second Circuit decision holding  
14 that plaintiffs must specify each pollutant unlawfully discharged by defendants. *Catskill Mountains*  
15 *Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 488 (2d Cir. 2001). Defendants do  
16 not suggest that the Ninth Circuit has adopted this standard, but even assuming the Ninth Circuit would  
17 follow the Second Circuit, plaintiffs sufficiently notified defendants of the particular pollutants at issue  
18 when plaintiffs alleged that defendants have discharged “pollutants such as oil, grease, anti-freeze, brake  
19 fluid, gasoline, transmission fluid, and other toxic substances,” CWA Notice at 3, and “oils, solvents,  
20 gasoline, anti-freeze, detergents and like pollutants known to be associated with dismantling  
21 operations,” *id.* at 7. This is sufficient to permit defendants to identify the activity alleged to constitute  
22 a violation, 40 C.F.R. § 135.3(a), and defendants are in a far better position than plaintiffs to know what  
23 other pollutants are discharged during automobile dismantling operations, *see Tosco*, 309 F.3d at 1158  
24 (“*Tosco* is obviously in a better position than [the plaintiffs] to identify the exact dates, or additional  
25 dates, of its own ship loading.”). The Court therefore DENIES defendants’ motion to dismiss the CWA  
26 claims for lack of subject matter jurisdiction.

27 Finally, defendants argue that plaintiffs’ RCRA claims also must be dismissed for insufficient  
28 notice. For the reasons discussed above, the Court DENIES defendants’ motion to dismiss the RCRA



1 claims for lack of subject matter jurisdiction. Although it is unclear exactly how defendants are  
2 challenging the RCRA claims, to the extent they also argue that plaintiffs' RCRA claims should be  
3 dismissed for failure to state a claim, the Court holds that plaintiffs' complaint states a claim for  
4 violations of the RCRA and that plaintiffs are entitled to put forth facts regarding solid and hazardous  
5 waste.

6  
7 **CONCLUSION**

8 For all of the foregoing reasons, the Court DENIES defendants' motion to dismiss for lack of  
9 subject matter jurisdiction [Docket No. 3].

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11 **IT IS SO ORDERED.**

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13 Dated: December 3, 2007

  
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SUSAN ILLSTON  
United States District Judge